

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

BRANDAN MARIE PRYOR,

Plaintiff,

v.

CAROLYN W. COLVIN,
Commissioner of Social Security,

Defendant.

No. 2:14-CV-00065-RHW

ORDER GRANTING IN PART
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment. ECF Nos. 18, 20. Attorney Jeffrey Schwab represents Brandan Marie Pryor (Plaintiff); Special Assistant United States Attorney Leisa A. Wolf represents the Commissioner of Social Security (Defendant). After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS, in part,** Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

JURISDICTION

On October 26, 2010, Plaintiff filed applications for Supplemental Security Income (SSI) and Disability Insurance Benefits (DIB), alleging disability since September 1, 2009. Tr. 269-77, 278-83. The applications were denied initially

1 and upon reconsideration. Tr. 108-39, 144-77. Administrative Law Judge (ALJ)
2 R.J. Payne held a hearing on April 10, 2012, Tr. 39-63, at which Plaintiff,
3 represented by counsel, testified as did medical experts Arthur Lorber, M.D. and
4 Ellen Rozenfeld, Ph.D. A supplemental hearing was held on October 16, 2012, at
5 which vocational expert (VE) Daniel McKinney, Sr. testified; Plaintiff testified by
6 telephone. Tr. 64-105. The ALJ issued an unfavorable decision on November 2,
7 2012. Tr. 18-38. The Appeals Council denied review. Tr. 1-7. The ALJ's
8 November 2012 decision became the final decision of the Commissioner, which is
9 appealable to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this
10 action for judicial review on March 10, 2014. ECF Nos. 1, 3.

11 **STATEMENT OF FACTS**

12 The facts of the case are set forth in the administrative hearing transcript, the
13 ALJ's decision, and the briefs of the parties. They are only briefly summarized
14 here.

15 Plaintiff was 27 years old at the time of the April 2012 hearing. Tr. 271.
16 Plaintiff graduated from high school. Tr. 78. Plaintiff last worked at a bakery/deli
17 for a period of six months. Tr. 46-47, 74. At first she worked full time, but her
18 employer reduced her hours when the employer "noticed that [the work] was very
19 hard on [her]," and she was laid off a week prior to the April 10, 2012 hearing. Tr.
20 46-47, 74-75. Plaintiff has also worked as a cashier, secretary, and fast food cook.
21 Tr. 92, 315.

22 At the October 16, 2012 hearing, Plaintiff testified that she was enrolled at a
23 community college and went to class one hour a day, five days a week. Tr. 76.
24 Plaintiff stated she did not have difficulty meeting the attendance requirements, but
25 sitting in class hurts her hips. Tr. 77.

26 Plaintiff testified that she sometimes has hallucinations. Tr. 74. During a
27 psychotic breakdown in April 2012, she testified that she thought she was being
28 followed/harassed by satellites and thought people were watching and talking to

1 her. Tr. 69. When Plaintiff reads, she hears voices in her head. Tr. 95. Plaintiff
2 testified that she feels like crying all the time. Tr. 83. Plaintiff also testified that
3 she has pain in her lower back and tail bone area. Tr. 90. Plaintiff's hips feel
4 strained and pressured when sitting and standing. Tr. 90.

5 On a typical day, Plaintiff attends community college for an hour and
6 usually has some kind of medical appointment. Tr. 78. Plaintiff sometimes
7 socializes with her daughter's father or her ex-boyfriend. Tr. 80. Plaintiff has two
8 children, but at the time of the hearing, family members were caring for the
9 children and Plaintiff had to be supervised during visits with the children. Tr. 73,
10 83. Plaintiff testified that she would like to return to work doing a job that "wasn't
11 too physically strenuous on [her] body." Tr. 86.

12 **STANDARD OF REVIEW**

13 The ALJ is responsible for determining credibility, resolving conflicts in
14 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
15 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,
16 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d
17 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is
18 not supported by substantial evidence or if it is based on legal error. *Tackett v.*
19 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as
20 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put
21 another way, substantial evidence is such relevant evidence as a reasonable mind
22 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402
23 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational
24 interpretation, the court may not substitute its judgment for that of the ALJ.
25 *Tackett*, 180 F.3d at 1097. Nevertheless, a decision supported by substantial
26 evidence will still be set aside if the proper legal standards were not applied in
27 weighing the evidence and making the decision. *Browner v. Secretary of Health*
28 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If substantial evidence

1 supports the administrative findings, or if conflicting evidence supports a finding
2 of either disability or non-disability, the ALJ's determination is conclusive.
3 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

4 **SEQUENTIAL EVALUATION PROCESS**

5 The Commissioner has established a five-step sequential evaluation process
6 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
7 416.920(a); *see Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one
8 through four, the burden of proof rests upon claimants to establish a prima facie
9 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This
10 burden is met once claimants establish that physical or mental impairments prevent
11 them from engaging in their previous occupations. 20 C.F.R. §§ 404.1520(a)(4),
12 416.920(a)(4). If claimants cannot do their past relevant work, the ALJ proceeds
13 to step five, and the burden shifts to the Commissioner to show that (1) the
14 claimants can make an adjustment to other work, and (2) specific jobs exist in the
15 national economy which claimants can perform. *Batson v. Comm'r of Soc. Sec.*
16 *Admin.*, 359 F.3d 1190, 1193-1194 (2004). If claimants cannot make an
17 adjustment to other work in the national economy, a finding of "disabled" is made.
18 20 C.F.R. §§ 404.1520(a)(i-v), 416.920(a)(4)(i-v).

19 **ADMINISTRATIVE DECISION**

20 On November 2, 2012, the ALJ issued a decision finding Plaintiff was not
21 disabled as defined in the Social Security Act. Preliminarily, the ALJ found
22 Plaintiff met the insured status requirements of the Social Security Act through
23 September 30, 2010. Tr. 23.

24 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
25 activity since September 1, 2009, the alleged onset date. Tr. 23.

26 At step two, the ALJ determined Plaintiff had the following severe
27 impairments: degenerative disk disease of the lumbar spine, depressive disorder,
28 posttraumatic stress disorder (PTSD), pain disorder, and substance abuse. Tr. 23.

1 At step three, the ALJ found Plaintiff did not have an impairment or
2 combination of impairments that met or medically equaled the severity of one of
3 the listed impairments. Tr. 26.

4 At step four, the ALJ determined that Plaintiff had the residual function
5 capacity (RFC) to perform sedentary work except

6
7 She is only able to sit, stand, or walk for 30 minutes at a time,
8 occasionally stoop, crouch, kneel, or climb ramps and stairs, and
9 never crawl, balance, or climb ladders, ropes, or scaffolds. She can
10 lift 20 pounds occasionally, and 10 pounds frequently. She should
11 avoid concentrated exposure to strong vibrations and unprotected
12 heights. [Plaintiff] is capable of understanding and remembering
13 simple (repetitive, 1-3 step tasks), but she may have increased
14 difficulty as task complexity increases. She is capable of working
15 around others superficially, but would likely have difficulty as social
16 demands or complexity increases. [Plaintiff] is capable of superficial
17 social interactions with the general public and coworkers, but she
18 would likely have increased difficulty as social complexity increases.
19 She would be capable of responding appropriately to supervision.

20 Tr. 27-28. The ALJ concluded that Plaintiff was unable to perform any past
21 relevant work. Tr. 31.

22 At step five, the ALJ determined that, considering Plaintiff's age, education,
23 work experience and RFC, and based on the testimony of the VE, there were other
24 jobs that exist in significant numbers in the national economy Plaintiff could
25 perform, including the jobs of cashier II, small parts/products assembler, small
26 parts and product inspector, and hand bander. Tr. 32-33. The ALJ thus concluded
27 Plaintiff was not under a disability within the meaning of the Social Security Act at
28 any time from September 1, 2009 through the date of the ALJ's decision. Tr. 33.

ISSUES

The question presented is whether substantial evidence supports the ALJ's
decision denying benefits and, if so, whether that decision is based on proper legal

standards. Plaintiff contends the ALJ erred by (1) improperly rejecting the opinions of Plaintiff's treating and examining medical providers; (2) improperly rejecting Plaintiff's subjective complaints, and (3) failing to make an adequate step five finding that Plaintiff can perform other work despite her specific functional limitations.

DISCUSSION

A. Credibility

Plaintiff contests the ALJ's adverse credibility determination. ECF No. 18 at 21-25.

It is generally the province of the ALJ to make credibility determinations, *Andrews*, 53 F.3d at 1043, but the ALJ's findings must be supported by specific cogent reasons, *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent affirmative evidence of malingering, the ALJ's reasons for rejecting the claimant's testimony must be "specific, clear and convincing." *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996). "General findings are insufficient: rather the ALJ must identify what testimony is not credible and what evidence undermines the claimant's complaints." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995).

The ALJ found Plaintiff not fully credible concerning her reporting of the intensity, persistence, and limiting effects of her symptoms to the extent her reporting was inconsistent with the ALJ's RFC determination. Tr. 29. The ALJ reasoned that Plaintiff was less than credible because her symptom reporting was contrary to the medical evidence, her activities of daily living, and the fact that she was able to work during the period of alleged disability. Tr. 29. The ALJ further noted inconsistencies in Plaintiff's reporting of substance abuse and the fact that her doctors did not prescribe her pain medication. Tr. 29.

1. Contrary to the objective medical evidence

The ALJ noted that "there are some inconsistencies between [Plaintiff's] statements and the objective medical evidence." Tr. 29.

1 Although it cannot serve as the sole ground for discrediting a claimant,
2 objective medical evidence is a “relevant factor in determining the severity of the
3 claimant's pain and its disabling effects.” *Rollins v. Massanari*, 261 F.3d 853, 857
4 (9th Cir. 2001).

5 The ALJ summarized the medical evidence in his RFC determination, but
6 did not specify inconsistencies between the medical evidence and Plaintiff’s
7 symptom reporting. The Court is not permitted to “comb the administrative record
8 to find specific conflicts.” *Burrell v. Colvin*, 775 F.3d 1133, 1138 (9th Cir. 2014).
9 The ALJ’s conclusion that the objective medical evidence is inconsistent with
10 Plaintiff’s reporting is not a specific, clear, and convincing reason to discredit
11 Plaintiff.

12 **2. Daily activities**

13 The ALJ noted that Plaintiff was a full time student in 2010 and attended
14 community college part time at the time of the hearing. Tr. 29 (citing Tr. 592).
15 The ALJ concluded that attending classes required many of “the same skills as full-
16 time work, such as concentration, time management, social skills, and mental
17 acuity.” Tr. 29. The ALJ also noted Plaintiff was able to keep house, take care of
18 two small children, ride her bike, socialize, and take a six hour bus ride. Tr. 29
19 (citing Tr. 564, 1047).

20 A claimant’s daily activities may support an adverse credibility finding if (1)
21 the claimant’s activities contradict his or her other testimony, or (2) “the claimant
22 is able to spend a substantial part of his day engaged in pursuits involving
23 performance of physical functions that are transferable to a work setting.” *Orn v.*
24 *Astrue*, 495 F.3d 625, 639 (9th Cir. 2007) (citing *Fair v. Bowen*, 885 F.2d 597, 603
25 (9th Cir. 1989)). “The ALJ must make ‘specific findings relating to [the daily]
26 activities’ and their transferability to conclude that a claimant’s daily activities
27 warrant an adverse credibility determination.” *Id.* (quoting *Burch v. Barnhart*, 400
28

1 F.3d 676, 681 (9th Cir. 2005)). A claimant need not be “utterly incapacitated” to
2 be eligible for benefits. *Fair*, 885 F.2d at 603.

3 The ALJ’s citation to Plaintiff’s activities is partially a specific, clear, and
4 convincing reason to discredit Plaintiff.

5 The ALJ did not err in reasoning that Plaintiff’s ability to take community
6 college classes evidences that Plaintiff possesses skills that would transfer to full
7 time work, such as “concentration, time management, social skills, and mental
8 acuity.” Tr. 29. This finding is supported by substantial evidence. *See* Tr. 77-78
9 (Plaintiff testifying that she does not have problems understanding the coursework
10 or with regular school attendance).

11 The ALJ erred in finding that Plaintiff can keep house and take care of her
12 two small children. In support of this finding, the ALJ cited to Tr. 564 (Exhibit
13 No. 9F/40). Tr. 29. This document is a report made by Plaintiff’s case worker
14 after she stopped by Plaintiff’s apartment to drop off a Christmas basket. Plaintiff
15 was not at home, but Plaintiff’s four year old daughter let the case worker into
16 Plaintiff’s apartment. Tr. 564. The case worker observed, “the house was a mess,
17 there was no food in the cupboards, and both of the kids were [unattended and]
18 awake sitting on the couch.” Tr. 564. No reasonable interpretation of this report
19 would lead to conclusion that Plaintiff can keep house and take care of her children
20 as found by the ALJ. Given that the ALJ failed to cite to evidence that indicates
21 Plaintiff is capable of household chores and taking care of her children, this is not a
22 specific, clear, and convincing reason to discredit Plaintiff.

23 The ALJ also erred in using Plaintiff’s reports of riding her bike and taking a
24 long distance bus ride to discredit her. Only one report in the voluminous record, a
25 mere scintilla of evidence, supports the Plaintiff rides her bike. Tr. 1047.

26 Likewise, Plaintiff did take a long distance bus ride, Tr. 89, but the ALJ fails to
27 point to how this is inconsistent with Plaintiff’s symptom reporting or involved
28 tasks that would transfer to a work setting. The ALJ erred in citing Plaintiff’s

1 ability to ride a bike and the bus as a reason to discredit her. *See Fair*, 885 F.2d at
2 603 (A claimant need not be “utterly incapacitated” to be eligible for benefits).

3 **3. Work during period of alleged disability**

4 The ALJ noted that, for a period of six months, Plaintiff was able to do work
5 that required standing all day and lifting thirty pounds. Tr. 29.

6 Generally, a claimant’s ability to work can be considered in assessing
7 credibility. *Bray v. Comm’r, Soc. Sec. Admin.*, 554 F.3d 1219, 1227 (9th Cir.
8 2009). But the fact that a claimant “tried to work for a short period of time and,
9 because of his impairments, *failed*,” should not be used to discredit the claimant.
10 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1038-39 (9th Cir. 2007). In fact, evidence
11 that a claimant tried to work and failed may support the claimant’s allegations of
12 disabling pain. *Id.* at 1038; *see also Webb v. Barnhart*, 433 F.3d 683, 688 (9th Cir.
13 2005) (noting the fact that the claimant sought employment “suggests no more than
14 that he was doing his utmost, in spite of his health, to support himself.”).

15 The ALJ erred in citing Plaintiff’s attempts at working to discredit Plaintiff.
16 Plaintiff testified that she was laid off from this work because her impairments
17 prevented her from completing her job tasks. Tr. 46-47, 74-76. There is no
18 evidence that Plaintiff stopped working at this job for other reasons. The fact that
19 Plaintiff tried to work for a short time but failed because of her impairments tends
20 to support Plaintiff’s allegations of disabling pain. *Lingenfelter*, 504 F.3d at 1038.
21 The ALJ erred in using Plaintiff’s work attempt to discredit Plaintiff.

22 **4. Inconsistent statements about substance abuse**

23 The ALJ noted that Plaintiff testified that she last used methamphetamine
24 four to five months prior to the October 2012 administrative hearing, but treatment
25 notes indicate that she last used methamphetamine in August 2012. Tr. 29.

26 An ALJ may consider evidence of a claimant’s substance use in assessing
27 credibility. *Thomas v. Barnhart*, 278 F.3d 947, 959 (9th Cir. 2002) (ALJ’s finding
28 that claimant was not a reliable historian regarding drug and alcohol usage

1 supports negative credibility determination); *Verduzco v. Apfel*, 188 F.3d 1087,
 2 1090 (9th Cir. 1999) (conflicting or inconsistent testimony concerning alcohol or
 3 drug use can contribute to an adverse credibility finding).

4 The ALJ did not err in citing Plaintiff's inconsistent reporting of her drug
 5 use as a reason to discredit her. At the October 2012 hearing, Plaintiff testified that
 6 she last used methamphetamine about four months prior to the hearing (or
 7 approximately May-June 2012). Tr. 70. But, as noted by the ALJ, a therapy note
 8 dated August 21, 2012 states that Plaintiff had "used meth two or three days ago."
 9 Tr. 1019. Plaintiff argues that "a few months discrepancy" in Plaintiff reporting is
 10 not a clear and convincing reason to discredit Plaintiff. ECF No. 18 at 23. The
 11 Court is inclined to agree with Plaintiff, but must defer to the ALJ's judgment in
 12 this instance. *See Tackett*, 180 F.3d at 1097 (if the evidence is susceptible to more
 13 than one rational interpretation, the court may not substitute its judgment for that
 14 of the ALJ). Even a minor inconsistency may be grounds to question a claimant's
 15 credibility, especially inconsistencies relating to a claimant's drug use, which
 16 could impact whether the claimant is eligible for Social Security benefits.
 17 Plaintiff's inconsistent reports of her drug use is a specific, clear, and convincing
 18 reason to discredit her.

19 **5. Failure to use pain medication**

20 The ALJ noted that Plaintiff had not "been prescribed medication for the
 21 relief of pain" and that Plaintiff treated her pain with over-the-counter medication.
 22 Tr. 29. From these facts, the ALJ inferred that Plaintiff's doctors did not think
 23 Plaintiff's pain warranted the use of prescription medication. Tr. 29.

24 Unexplained or inadequately explained reasons for failing to seek medical
 25 treatment cast doubt on a claimant's subjective complaints. 20 C.F.R. §§
 26 404.1530, 416.930; *Fair*, 885 F.2d at 603. A claimant's subjective pain testimony
 27 may be discounted by the fact that the claimant did not take pain medication.
 28 *Macri v. Chater*, 93 F.3d 540, 544 (9th Cir. 1996).

1 The ALJ erred in reasoning that Plaintiff's failure to take pain medication
2 suggested that Plaintiff's doctor's believed that her pain "[did] not warrant such
3 intervention." Tr. 29. Contrary to the ALJ's reasoning, the record indicates that
4 Plaintiff's treating sources did prescribe her pain medication. At various times, Dr.
5 Kirkham treated Plaintiff with Toradol, morphine, Zofran, and Vistaril, Tr. 835,
6 838, and prescribed medications including Ultracet, Darvocet-N, Nabumetone, and
7 Voltaren. Tr. 831, 834, 836-40. In April 2012, Dr. Kirkham opined that
8 medication might address Plaintiff's back pain. Tr. 967. Furthermore, Plaintiff's
9 treating sources apparently considered use of opioid medication, but determined
10 that it was "not a good choice" for Plaintiff. Tr. 832. Substantial evidence does
11 not support the ALJ's conclusion that Plaintiff's treating sources did not prescribe
12 her pain medication because they did not believe such medication warranted.

13 **6. Conclusion**

14 Most of the reasons underlying the ALJ's adverse credibility finding are
15 unsupported or based on legal error. As discussed *infra*, the Court also concludes
16 that remand is appropriate for the ALJ to reevaluate the medical evidence and
17 make other findings, if necessary. Upon reevaluation of the medical evidence, the
18 ALJ should also reevaluate Plaintiff's credibility consistent with this Order.

19 **B. Evaluation of Medical Evidence**

20 Plaintiff argues the ALJ improperly rejected the opinions of her examining
21 mental health providers, including Thomas Genthe, Ph.D., Aaron R. Burdge,
22 Ph.D., and Mark Duris, Ph.D. as well as treating provider Brian Kirkham, M.D.
23 ECF No. 18 at 15-21.

24 "In making a determination of disability, the ALJ must develop the record
25 and interpret the medical evidence." *Howard ex. rel. Wolff v. Barhart*, 341 F.3d
26 1006, 1012 (9th Cir. 2003).

27 In weighing medical source opinions, the ALJ should distinguish between
28 three different types of physicians: (1) treating physicians, who actually treat the

1 claimant; (2) examining physicians, who examine but do not treat the claimant;
 2 and, (3) nonexamining physicians who neither treat nor examine the claimant.
 3 *Lester*, 81 F.3d at 830. The ALJ should give more weight to the opinion of a
 4 treating physician than to the opinion of an examining physician. *Orn*, 495 F.3d at
 5 631. The ALJ should give more weight to the opinion of an examining physician
 6 than to the opinion of a nonexamining physician. *Id.*

7 When a physician's opinion is not contradicted by another physician, the
 8 ALJ may reject the opinion only for "clear and convincing" reasons. *Baxter v.*
 9 *Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991). When a physician's opinion is
 10 contradicted by another physician, the ALJ is only required to provide "specific
 11 and legitimate reasons" for rejecting the opinion of the first physician. *Murray v.*
 12 *Heckler*, 722 F.2d 499, 502 (9th Cir. 1983).

13 To the extent that Drs. Genthe, Burdge, Duris, and Kirkham concluded that
 14 Plaintiff was disabled, their opinions are contradicted by the testifying medical
 15 experts and reviewing State agency doctors. *See* Tr. 43-56 (Arthur Lorber, M.D.),
 16 56-62 (Ellen Rozenfeld, Ph.D.), 142-59, 160-77 (Edward Beaty, Ph.D. and Alfred
 17 Scottolini, M.D.). Therefore, the ALJ was required to provide specific and
 18 legitimate reasons for rejecting the opinions finding Plaintiff disabled.

19 **1. Thomas Genthe, Ph.D., Aaron R. Burdge, Ph.D., and Mark Duris,**
 20 **Ph.D.**

21 Dr. Genthe completed a psychological evaluation of Plaintiff in June 2008.
 22 Tr. 373-89. Dr. Genthe diagnosed Plaintiff with Polysubstance Dependence, in
 23 unknown remission; Marijuana Abuse; Eating Disorder, NOS; Mood Disorder,
 24 NOS. Tr. 374. Dr. Genthe assessed Plaintiff with no more than moderate
 25 cognitive and social functional limitations. Tr. 375. Dr. Genthe concluded that

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1 Plaintiff presented with an overall normal mental status. Her
2 responses did not suggest any significant impairment in her ability to
3 understand, remember, and carry out simple instructions. Her ability
4 to understand, remember and carry out more complex instructions,
5 such as multi-tasking or multiple-step task, was assessed as relatively
6 unimpaired . . . [Plaintiff] presented with adequate attention span. Her
7 capacity to focus and stay on task appeared to be intact. Her capacity
8 to continue with low-level attentional surveillance over an extended
9 period of time (vigilance) appears to be sufficiently long to permit the
10 timely and appropriate completion of tasks commonly found in at
11 least simple and repetitive work settings.

9 Tr. 380.

10 Dr. Genthe completed a second psychological evaluation of Plaintiff in
11 February 2011. Tr. 511-18. Dr. Genthe diagnosed Plaintiff with Pain Disorder
12 Associated with Psychological Features and a General Medical Condition; Major
13 Depressive Disorder, Recurrent; PTSD; Cannabis Dependence; Methamphetamine
14 Dependence, in full sustained remission; Alcohol Dependence, in full-sustained
15 remission; and, Personality Disorder, NOS (with borderline features). Tr. 517. Dr.
16 Genthe found Plaintiff's social and cognitive abilities were "good" or "fair." Tr.
17 517. Dr. Genthe concluded that, at the time of the evaluation, Plaintiff was
18 "unlikely to be able to function adequately in a work setting until her symptoms
19 have been managed more effectively." Tr. 517.

20 Dr. Duris completed a psychological evaluation of Plaintiff in November
21 2010. Tr. 503-10. Dr. Duris diagnosed Plaintiff with Major Depressive Disorder,
22 Recurrent; PTSD; Agoraphobia without a history of Panic Disorder; Social Phobia;
23 Intermittent Explosive Disorder; Centralized Anxiety Disorder; Cannabis
24 Dependence (current); Methamphetamine Dependence in Early Full Remission (2
25 months); Alcohol Dependence in Sustained Full Remission; and, Borderline
26 Personality Disorder. Tr. 507. Dr. Duris assessed Plaintiff with a number of
27 moderate and marked social and cognitive limitations. Tr. 508. Dr. Duris also
28

1 found Plaintiff was severely limited in her abilities to communicate and perform
2 effectively in a work setting with public contact, to communicate and perform
3 effectively in a work setting with limited public contact, and to maintain
4 appropriate behavior in a work setting. Tr. 508.

5 Dr. Burdge completed a psychological evaluation of Plaintiff in May 2012.
6 Tr. 986-97. Dr. Burdge diagnosed Plaintiff with Anxiety Disorder, NOS; Major
7 Depressive Disorder, Recurrent, Moderate; Pain Disorder Associated with Both
8 Psychological Factors and a General Medical Condition; Borderline Personality
9 Disorder; and, a number of substance abuse disorders. Tr. 990, 993. Dr. Burdge
10 opinioned that Plaintiff was “unlikely to function adequately in a work setting until
11 her psychological symptoms have been managed more effectively.” Tr. 991. Dr.
12 Burdge assessed Plaintiff with a number of nonexertional limitations. Tr. 991. Dr.
13 Burdge found Plaintiff moderately limited in her ability to perform activities within
14 a schedule and maintain regular punctual attendance, perform routine tasks without
15 undue supervision, adapt to changes in a routine work setting, ask simple questions
16 or request assistance, and set realistic goals and plan independently. Tr. 991. Dr.
17 Burdge found Plaintiff markedly limited in her ability to communicate and perform
18 effectively in a work setting with limited public contact, maintain appropriate
19 behavior in a work setting, and complete a normal workday and workweek without
20 interruptions from psychologically based symptoms. Tr. 991.

21 The ALJ gave little weight to the evaluations of Drs. Genthe, Burdge, and
22 Duris. Tr. 31. The ALJ reasoned that each of these doctors evaluated Plaintiff on
23 only one occasion “in a secondary gain context.” Tr. 31. The ALJ specified that
24 these evaluations were “liberally done to ensure Department of Social and Health
25 Services [(DSHS)] benefits to the needy.” Tr. 31. The ALJ also noted that the
26 evaluations “were substantially based on what [Plaintiff] related to [the doctors].”
27 Tr. 31. The ALJ further noted that the evaluations were made using “check-box
28 form reports prepared for [DSHS].” Tr. 31. Finally, the ALJ reasoned that DSHS

1 definitions and standards differ from definitions and standards used by the Social
2 Security Administration (SSA). Tr. 31.

3 The ALJ failed to provide specific and legitimate reasons for rejecting these
4 four evaluations. First, the fact that Plaintiff sought the evaluations for purposes of
5 obtaining benefits is not a reason for rejecting them. *See Lester*, 81 F.3d at 832.
6 (“[T]he purpose for which medical reports are obtained does not provide a
7 legitimate basis for rejecting them.”). Second, there is no indication that these
8 reports were “liberally done” to help Plaintiff obtain benefits or unduly relied on
9 Plaintiff’s incredible self-reporting. The evaluations are supported by
10 psychological testing, mental status exams, and are based on the doctors’
11 professional expertise. Third, none of these evaluations consist solely of “check-
12 off forms,” as found by the ALJ. To the contrary, these four evaluations contain
13 lengthy narrative reports and document numerous psychological tests administered
14 to Plaintiff. Finally, the fact that definitions of limitations used by DSHS differ
15 from SSA definitions used for assessing mental disorders is not a specific and
16 legitimate reason to reject opinions rendered by an acceptable medical source.
17 *Accord Martin v. Astrue*, 2011 WL 3626771, at *10 (E.D. Wash. Aug. 17, 2011)
18 (noting that “differences [between the DSHS definitions and SSA definitions]
19 reduce the value of an opinion based on the DSHS definitions” and concluding that
20 the discrepancies are a germane reason to reject the opinions of “other” sources).
21 The ALJ failed to give specific and legitimate reasons for rejecting these
22 evaluations.

23 On remand, the ALJ shall credit the opinions of Drs. Genthe, Burdge, and
24 Duris or give specific and legitimate reasons for rejecting them.

25 **2. W. Brian Kirkham, M.D.**

26 Dr. Kirkham was Plaintiff’s primary care physician. In August 2010, Dr.
27 Kirkham completed paperwork for Plaintiff’s application for State benefits. Tr.
28 490-92. Dr. Kirkham opined that Plaintiff’s back pain limited her to sedentary

1 work and she would only be able to work 11-20 hours a week. Tr. 490-91. Dr.
2 Kirkham noted that excessive walking, lifting greater than twenty pounds, bending,
3 and stooping would aggravate Plaintiff's pain. Tr. 490. In an August 2010
4 treatment note, Dr. Kirkham opined that Plaintiff would likely need back surgery
5 and that she should make an appointment with specialist Hank Vejvoda, M.D.¹ Tr.
6 836. In April 2012, Dr. Kirkham completed additional paperwork for Plaintiff's
7 application for State benefits. Tr. 966-68. Dr. Kirkham made observations similar
8 to those he made in the August 2010 paperwork and again concluded that Plaintiff
9 was limited to sedentary work. Tr. 967.

10 The ALJ generally gave "great weight" to Dr. Kirkham's opinions, but gave
11 less weight to Dr. Kirkham's opinion that Plaintiff is only capable of part time
12 sedentary work. Tr. 30 (citing Tr. 490-92, 967). The ALJ reasoned this opinion
13 was "without substantial support from the other evidence of record." Tr. 30. The
14 ALJ also discussed situations in which treating doctors might provide opinions
15 consistent with a patient's reporting, either out of sympathy or a patient's
16 insistence. Tr. 30. The ALJ suggested that these reasons may have influenced Dr.
17 Kirkham's opinions. Tr. 30.

18 The ALJ gave at least one specific and legitimate reason for rejecting Dr.
19 Kirkham's opinion regarding Plaintiff's limitation to part time sedentary work and
20 any error is harmless. Inconsistency with the majority of the medical evidence is a
21 specific and legitimate reason for rejecting a doctor's opinion. *Batson*, 359 F.3d at
22 1196. As noted by the ALJ, the majority of the evidence supporting Plaintiff's
23 physical impairments does not support the degree of severity found by Dr.
24 Kirkham. *See, e.g.*, Tr. 52 (Dr. Lober opining Plaintiff capable of light work with
25

26 ¹At a November 2010 appointment, Dr. Vejvoda concluded that "[s]urgery is
27 not going to help [Plaintiff]." Tr. 501. Dr. Vejvoda also concluded that Plaintiff
28 was capable of light work. Tr. 488.

1 some restrictions), 488 (Dr. Vejvoda opining that Plaintiff was capable of light
2 work). And other than Dr. Kirkham's opinion, no other medical evidence supports
3 that Plaintiff's physical impairments limit her to part time work. The ALJ's
4 comments concerning possible bias in the opinions of treating sources are not
5 specific and legitimate reasons for rejecting Dr. Kirkham's opinions. This
6 reasoning is general, unfounded, and contrary to the rule that a treating physician's
7 opinion is "entitled to deference," even when contradicted by other opinions. *Orn*,
8 495 F.3d at 633 (citing SSR 96-2p at 4, 61 Fed. Reg. at 34,491). But even if some
9 of the ALJ's reasoning was flawed, any error is harmless because the ALJ's RFC
10 determination limited Plaintiff to sedentary work with a number of restrictions. *Tr.*
11 27-28. *See Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008) (An error is
12 harmless when "it is clear from the record that the . . . error was inconsequential to
13 the ultimate nondisability determination.").

14 **C. RFC and Hypothetical Questions**

15 Plaintiff argues that the ALJ's hypothetical questions to the VE did not
16 account for all of Plaintiff's limitations, particularly the nonexertional mental
17 limitations assessed by Plaintiff's examining doctors and Dr. Kirkham's opinion
18 that Plaintiff could only work part time. ECF No. 18 at 25-26. As discussed
19 *supra*, the Court finds the ALJ did not err in rejecting Dr. Kirkham's opinion that
20 Plaintiff is only capable of part time work. But the Court finds remand necessary
21 for the ALJ to reassess Plaintiff's credibility and to reevaluate the opinions of Drs.
22 Genthe, Burdge, and Duris, all of which assess Plaintiff with significant
23 nonexertional limitations. Depending on the ALJ's evaluation of the medical
24 evidence and Plaintiff's credibility, the ALJ may need to modify his RFC
25 determination and pose additional hypothetical questions to a VE taking into
26 account additional limitations.

REMEDY

The decision whether to remand for further proceedings or reverse and award benefits is within the discretion of the district court. *McAlliser v. Sullivan*, 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate where “no useful purpose would be served by further administrative proceedings, or where the record has been thoroughly developed,” *Varney v. Secretary of Health & Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused by remand would be “unduly burdensome,” *Terry v. Sullivan*, 903 F.2d 1273, 1280 (9th Cir. 1990). *See also Garrison v. Colvin*, 759 F.3d 995, 1021 (9th Cir. 2014) (noting that a district court may abuse its discretion not to remand for benefits when all of these conditions are met). This policy is based on the “need to expedite disability claims.” *Varney*, 859 F.2d at 1401. But where there are outstanding issues that must be resolved before a determination can be made, and it is not clear from the record that the ALJ would be required to find a claimant disabled if all the evidence were properly evaluated, remand is appropriate. *See Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*, 211 F.3d 1172, 1179-80 (9th Cir. 2000).

In this case, it is not clear from the record that the ALJ would be required to find Plaintiff disabled if all the evidence were properly evaluated. Further proceedings are necessary for the ALJ to reevaluate Plaintiff’s credibility and the medical evidence. Additionally, Plaintiff has been diagnosed with a number of substance abuse disorders and she continued to use drugs during her period of alleged disability. If the ALJ concludes that Plaintiff is disabled, the ALJ should analyze whether Plaintiff’s drug abuse is a contributing factor material to her disability. *See* 42 U.S.C. §§ 423(d)(2)(C) & 1382(a)(3)(J); *Bustamante v. Massanari*, 262 F.3d 949 (9th Cir. 2001).

1 **CONCLUSION**

2 Having reviewed the record and the ALJ's findings, the Court finds the
3 ALJ's decision is not supported by substantial evidence and is based on legal error.
4 At the new administrative hearing, the ALJ, if warranted, shall elicit the testimony
5 of a medical expert to assist the ALJ in formulating a new RFC determination.
6 The ALJ shall present the new RFC assessment to a VE to help determine if
7 Plaintiff is capable of performing any other work existing in sufficient numbers in
8 the national economy. Accordingly, **IT IS ORDERED:**

9 1. Defendant's Motion for Summary Judgment, **ECF No. 20**, is
10 **DENIED.**

11 2. Plaintiff's Motion for Summary Judgment, **ECF No. 18**, is
12 **GRANTED, in part**, and the matter is **REMANDED** to the Commissioner for
13 additional proceedings consistent with this Order.

14 3. Application for attorney fees may be filed by separate motion.

15 4. The District Court Executive is directed to enter judgment in favor of
16 Plaintiff and against Defendant.

17 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
18 Order, forward copies to counsel and **close the file.**

19 **DATED** this 11th day of August, 2015.
20

21 *s/Robert H. Whaley*
22 **ROBERT H. WHALEY**
23 Senior United States District Judge
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